

1 JOHN C. BEIERS, COUNTY COUNSEL (SBN 144282)
2 By: Kimberly A. Marlow, Deputy (SBN 130342)
3 By: Timothy J. Fox, Deputy (SBN 190084)
4 By: Lauren F. Carroll, Deputy (SBN 333446)
5 Hall of Justice and Records
6 400 County Center, 6th Floor
7 Redwood City, CA 94063
8 Telephone: (650) 363-4787
9 Facsimile: (650) 363-4034
10 E-mail: lcarroll@smcgov.org
kmarlow@smcgov.org
tfox@smcgov.org

11
12 Attorneys for Defendant
13 COUNTY OF SAN MATEO

14
15 UNITED STATES DISTRICT COURT
16 NORTHERN DISTRICT OF CALIFORNIA

17 MENDELSON, FELIX, as trustee for THE
18 SHTAIMAN FAMILY TRUST,

19 Plaintiff,

20 vs.

21 COUNTY OF SAN MATEO,

22 Defendant

23 Case No. 20-cv-05696-AGT

24 DEFENDANT COUNTY OF SAN MATEO'S
25 SUPPLEMENTAL REPLY BRIEF IN
26 SUPPORT OF ITS MOTION TO DISMISS

27
28 THE HONORABLE ALEX G. TSE

1 **I. INTRODUCTION**

2 The issue here is whether Plaintiff Felix Mendelson has established that Defendant County of San
 3 Mateo has rendered a final decision as to how its regulations apply to his property, and thus whether his
 4 takings claim is ripe for adjudication. Under the Supreme Court's recent decision in *Pakdel*, he has not.

5 *Pakdel* in no way diminished, but rather reaffirmed, the rule that a regulatory takings claim is not
 6 ripe without a final decision by the relevant government agency. Mendelson's interpretation of the final
 7 decision rule is so narrow as to nearly eliminate it. He can find no support in *Pakdel*, nor the cases
 8 decided before and after *Pakdel*, for his view that he can establish finality based solely on the text of the
 9 regulations and the County's non-response to an informal inquiry about his property.

10 In his Supplemental Brief, Mendelson leans heavily on *Pakdel*'s holding that administrative
 11 exhaustion is not necessarily a prerequisite to a ripe takings claim. He believes this holding excuses him
 12 from ever applying for a development permit. But he downplays a crucial caveat: Exhaustion is not a
 13 prerequisite only "when the government has reached a conclusive position." 141 S. Ct. at 2231.
 14 Mendelson has not shown that the County has reached any decision about his property, let alone a
 15 conclusive one. Contrary to Mendelson's characterization, the County's position is not that his "takings
 16 claim is not ripe until he mechanically submits and is inevitably denied at least one development
 17 proposal." Plf.'s Supp. Br. 4:3-4. Rather, it is that his failure to submit a development proposal is
 18 evidence that, and an explanation for why, he has not received a final decision from the County.

19 Mendelson's claims remain unripe under *Pakdel*, and this court should grant the County's motion
 20 to dismiss the Complaint without leave to amend.

21 **II. ARGUMENT**

22 **A. Finality under *Pakdel* requires Mendelson to allege facts showing that the County has made
 23 a final decision applying its regulations to his property, and he has not done so.**

24 Mendelson misleadingly claims that "Under *Pakdel*, a court simply must ask whether the agency
 25 has a position on whether and how much development is allowed under a regulation." Plf.'s Supp. Br.
 26 7:8-9. Although "the finality requirement is relatively modest" (not "very" modest, as Mendelson puts it),
 27 *Pakdel* still requires a plaintiff to show something more than just "a" government position. 141 S. Ct. at
 28 2230. This position must be "final," "definitive," "conclusive." The plaintiff must show that there is no

1 more room “for the government to clarify or change its position.” *Id.* at 2231. Only when the government
 2 “is committed to a position,” do “potential ambiguities evaporate and the dispute is ripe for judicial
 3 resolution.” *Id.* at 2230. Mendelson alleges no facts showing that the County has ever taken any position
 4 about how it would apply the Riparian Corridor regulations to his property.

5 Despite bringing an as-applied rather than facial challenge to the Riparian Corridor regulations,
 6 Mendelson asserts that the mere existence of strict land use regulations are a taking. He claims that
 7 *Pakdel* stands for the following proposition: When a government adopts strict land use regulations, its
 8 position about a potentially impacted property “has been codified – and is as clearly ascertainable as if it
 9 had rendered a decision following a formal development proposal.” Plf.’s Supp. Br. 7:8-16. Nowhere in
 10 *Pakdel* did the Court say that the text of a generally applicable regulation can itself be a final decision.
 11 *Pakdel* did not even contemplate that scenario, as it involved a landowner who had applied for and
 12 received a permit, but was definitively denied a variance from one of the permit conditions. 141 S. Ct. at
 13 2230. Contrary to Mendelson’s assertion, the Supreme Court has indicated that strict regulations alone
 14 are insufficient to establish finality. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 619 (2001) (explaining
 15 that the government’s position was known based on the seemingly “unequivocal nature of the wetland
 16 regulations at issue *and by* the Council’s application of the regulations to the subject property” (emphasis
 17 added)); *Suitum v. Tahoe Reg’l Plan. Agency*, 520 U.S. 725, 739 (1997) (“[A] sound judgment about
 18 what use will be allowed simply cannot be made by asking whether a parcel’s characteristics or a
 19 proposal’s details facially conform to the terms of the general use regulations.”)

20 Mendelson cites only a Report & Recommendation out of the Eastern District of New York to
 21 support his claim that the mere existence of regulations can establish finality, and even that case is
 22 readily distinguishable. *WG Woodmere v. Town of Hempstead*, Report and Recommendation, Aug. 23,
 23 2021, Case 2:20-cv-03903-ARR-AYS, ECF No. 49; Plf.’s Supp. Br. 7:17. There, the plaintiff wanted to
 24 redevelop its land, a golf club that spanned three towns. *Woodmere*, at 4. After years of negotiation and
 25 litigation concerning the towns’ resistance to the development, all three towns adopted strict flood area
 26 zoning rules that applied only to the property. *Id.* at 15. This “novel regulatory scheme” did not even
 27 apply to other golf clubs also located in flood zones. *Id.* at 20. Mendelson selectively quotes from this
 28 case to suggest that the nature of the regulations alone were sufficient to ripen the takings claim. Plf.’s

1 Supp. Br. 7:24-8:2. In reality, the court found that the towns had made their final position clear by
 2 enacting a zoning scheme that was “comprised only of the Property.” *Woodmere*, at 26. The court
 3 contrasted this from situations like the present case, in which the parcel at issue is just one of many
 4 covered by a regulatory scheme. *Id.* And “The years of negotiation which culminated in the Town’s
 5 refusal to even schedule a vote on prior zoning makes this [position] even clearer.” *Id.* In sum, it was the
 6 circumstances leading up to the adoption of the regulations – which involved plaintiff’s land directly and
 7 individually – that made the towns’ positions clear. Mendelson does not allege that the County enacted
 8 its Riparian Corridor regulations under similar circumstances affecting his land directly.

9 Mendelson also claims to establish finality based on the fact that the County did not respond to
 10 his alleged request for a “takings analysis.” Plf.’s Supp. Br. 8:12-26. Again, nothing in *Pakdel* supports a
 11 conclusion that a non-response to an informal inquiry on a limited issue is evidence that “the government
 12 is committed to a position” on how it will apply its regulations to the property. 141 S.Ct. at 2230. (In his
 13 supplemental brief, Mendelson calls his inquiry, alternatively, a “special application procedure” that
 14 leads to a “formal determination,” and an “informal process” that does not require “specific development
 15 plans.” 8:12-22. The latter description is consistent with the Complaint. ¶ 18.) On the contrary, *Pakdel*
 16 expects landowners to pursue the administrative process further to ripen their claims “if avenues still
 17 remain for the government to clarify or change its decision.” 141 S.Ct. at 2231. The County’s lack of
 18 response to an informal inquiry on a limited issue (whether a taking would occur if no development were
 19 allowed) can in no way be construed as a final decision as to how the County would apply the Riparian
 20 Corridor regulations to his property. Since the County has not had the opportunity to apply its regulations
 21 to his property, nor taken any definitive position as to how much development it will allow, avenues
 22 remain for the County to clarify its position – chiefly, through the formal application process.

23 The Supreme Court has consistently expressed that a land use agency must have the opportunity
 24 to use “its own reasonable procedures, to decide and explain the reach of a challenged regulation” before
 25 a takings claim is ripe. *Palazzolo*, 533 U.S. at 620. *Pakdel* did not repudiate this principle. Thus, it does
 26 not make sense to conclude that Mr. Mendelson’s claim is ripe just because the County did not respond
 27 to an informal inquiry, to which it has no obligation to respond, when he has not availed himself of
 28 procedures that are designed to elicit a final decision from the County.

1 As discussed thoroughly in the initial set of briefings on the County's motion to dismiss, the text
 2 of the Riparian Corridor regulations and the facts alleged in the Complaint do not, by themselves,
 3 establish that the County would necessarily deny any and all development on Mendelson's land. Def.'s
 4 Mot. to Dismiss 9:7-10:1, Sept. 29, 2020, ECF No. 11; *Pakdel*, 141 S.Ct. at 2230. To summarize, it is not
 5 clear how much of Mendelson's property is actually within the Riparian Corridor, and therefore how
 6 much of the property is subject to the Riparian Corridor regulations. And even if his property is entirely
 7 within the Riparian Corridor, the California Coastal Act specifically allows the County to grant a permit
 8 with appropriate mitigations, to the extent necessary to avoid an unconstitutional taking. Mr. Mendelson
 9 spends much of his supplemental brief rehashing his mistaken view that the County has zero discretion to
 10 permit development on his land, even though nothing in *Pakdel* speaks to the level of discretion the
 11 County has under its regulations or the California Coastal Act. *See, e.g.*, Plf.'s Supp. Br. 9:3-10:2.
 12 Therefore, analysis of this issue is no different than it was before *Pakdel*. *See also Ralston v. Cty. of San*
 13 *Mateo*, No. 21-CV-01880-EMC, 2021 WL 3810269, at *6 (N.D. Cal. Aug. 26, 2021) (concluding that
 14 the County has discretion to deviate from its Riparian Corridor regulations).

15 To support his claim that the County has no discretion to permit development on his land,
 16 Mendelson is attempting to introduce nine new, irrelevant County documents into the record, even
 17 though this Court's order allowed only supplemental briefing regarding *Pakdel*. Plf.'s Supp. Br. 4:22-5:1
 18 and 9:8-10. Plf.'s Request for Judicial Notice, Nov. 15, 2021, ECF No. 33.¹ If this Court takes notice of
 19 these records, it should not treat them as evidence that the County has no discretion to permit
 20 development on his lots. Most of the documents are several decades old and concern lots other than
 21 Mendelson's property, and none of them reflect any final decision by any County decision-maker about
 22 what it will allow on Mendelson's property if he applies to develop it. Mendelson does not explain in any
 23 detail why these documents are relevant to how the County would apply its regulations to his property
 24 today, or whether they should be viewed in a particular light following *Pakdel*. Even if the documents are
 25 judicially noticeable, they do not support a finding that finality has been established here.

26
 27 ¹ The County opposes this request for judicial notice and intends to file an opposition within 14 days
 28 after the request was filed, per Local Rule 7-3(a).

Because Mendelson has not pleaded any facts showing the County has come to a conclusive, final decision about his still-hypothetical proposal to develop his property, he has not established finality, *de facto* or otherwise, and his claims are not ripe.

B. For Mendelson’s claims to ripen under *Pakdel*, he must pursue the County’s administrative process up to and until no avenues remain for the County to change or clarify its decision.

Mendelson is correct that under *Pakdel*, it may be possible, in limited situations, for a regulatory takings claim to ripen even before a landowner applies for a development permit and receives a formal response. But, significantly, a plaintiff in that situation must identify other facts showing that the government has reached a final decision – as made clear in *Pakdel*. 141 S.Ct. at 2231 (stating that exhaustion “is not a prerequisite for a takings claim when the government has reached a conclusive position”).

For example, *Pakdel* quoted *Palazzolo* to say a claim is ripe when “submission of [a] proposal would not have clarified the extent of development permitted.” 141 S. Ct. at 2231 (quoting *Palazzolo*, 533 U.S. at 624). *Palazzolo* wanted to build 74 houses on his wetland property, but he never applied to build them. 533 U.S. at 624. The government did, however, conclusively decide that it would not allow *Palazzolo* to fill his wetlands. *Id.* at 623. “The rulings of the Council interpreting the regulations at issue, and the briefs, arguments, and candid statements by counsel for both sides, leave no doubt on this point: On the wetlands there can be no fill for any ordinary land use.” *Id.* Thus, “it follows of necessity that he could not fill and then build 74 single-family dwellings upon it.” *Id.* at 624. The government made it abundantly clear that it would not allow *Palazzolo* to develop the wetlands in any shape or form, so he did not need to submit a doomed development proposal for his claim to ripen. Because Mendelson has not alleged that the County has taken any action with respect to his property that can reasonably be considered a final decision, this is not one of the rare situations in which a regulatory takings claim is ripe before the plaintiff even submits a development proposal.

Contrary to Mendelson’s framing, the County does not seek to “impose a procedural burden” on him that “ordinary civil-rights plaintiffs are not forced to bear.” Plf.’s Supp. Br. 10:6-7. While complete administrative exhaustion is not necessarily a prerequisite for a takings lawsuit or most other civil rights claims, ripeness is. *Pakdel*, 141 S.Ct. at 2231. And pursuing at least some administrative process is

1 usually necessary to establish ripeness because that is the standard way to obtain a final decision from the
 2 agency charged with applying the regulations to particular parcels. *Pakdel* is clear that Mendelson must
 3 show that the County’s “definitive position” has inflicted an “actual, concrete injury” and that he is not
 4 “prematurely suing over a hypothetical harm.” *Id.* at 2230 (internal quotations and citations omitted).
 5 Asking Mendelson to engage with the County’s permit application process is not the same as requiring
 6 “rote exhaustion of administrative remedies for the sake of exhaustion.” Plf.’s Supp. Br. 7:1-2. It is
 7 asking him to give the County the tools and information it needs to reach a final decision. At a minimum,
 8 Mendelson must engage with the process until no avenues “remain for the government to clarify or
 9 change its decision.” *Pakdel*, 141 S. Ct. at 22231.

10 Mendelson argues that *Ralston v. County of San Mateo* was wrongly decided, in part because the
 11 court did not “adequately credit the Ralstons’ efforts (like Mr. Mendelson’s) to procure the County’s
 12 written acknowledgement of the [regulations’] prohibitory effect on their property” through a “takings
 13 analysis.” Plf.’s Supp. Br. 11:19-21. But the final decision rule is primarily concerned with how decisive
 14 the government’s actions are, not how much effort the landowner has expended. *See* 141 S. Ct. at 2231.
 15 The *Ralston* plaintiffs’ request for a takings analysis, and the Planning Director’s preliminary response
 16 regarding his potential recommendation for development on the plaintiffs’ property, was insufficient to
 17 constitute a final County decision. 2021 WL 3810269, at *5. The Director did not have authority to
 18 permit or deny development in that context, and he did not foreclose the possibility that the County may
 19 permit development based on a complete project proposal. *Id.* at *5-6. All that is to say that even if the
 20 County had responded to Mendelson’s request for a takings analysis, the response likely would not have
 21 been sufficiently final to ripen his claim. He still would have had to pursue additional procedures.

22 Although *Pakdel* was decided only a few months ago, several courts have had the chance to apply
 23 it. Yet Mr. Mendelson finds no support in the case law for his interpretation of *Pakdel*. Thus far, every
 24 court to apply *Pakdel* in this context has concluded that takings claimants are excused from pursuing
 25 *additional* process only when the government has made its position clear through a final decision directly
 26 related to the property at issue. *See, e.g., N. Mill St., LLC v. City of Aspen*, 6 F.4th 1216, 1234 (10th Cir.
 27 2021) (explaining that “a final decision generally requires ‘an initial rejection of a particular development
 28 proposal,’ and a ‘definitive action by local authorities indicating with some specificity what level of

1 development will be permitted on the property in question.””); *Willan v. Dane Cty.*, No. 21-1617, 2021
 2 WL 4269922, at *3 (7th Cir. Sept. 20, 2021) (finding no final decision when plaintiffs did “not allege
 3 taking any steps toward obtaining that permit”); *BJA Enterprises LLC v. City of Yuma*, No. CV-20-
 4 01901-PHX-ROS, 2021 WL 3912857, at *2 (D. Ariz. Aug. 31, 2021) (finding a final decision when the
 5 agency represented that any attempt to develop would be futile); *Ralston*, 2021 WL 3810269, at *7
 6 (“*Pakdel* does not – indeed it cannot – stand for the proposition that Plaintiffs need not formally apply for
 7 a CDP or submit a meaningful development proposal before filing suit.”). This Court should adopt the
 8 same approach and conclude that Mendelson has not obtained a final decision from the County and
 9 therefore is not excused from pursuing the County’s administrative process further.

10 It remains to be seen how the County would apply the regulations to Mendelson’s property if ever
 11 presented with a complete development proposal. “If the Court allows this lawsuit to proceed under the
 12 current posture, it would deprive the County of the opportunity to fully decide whether and how its”
 13 regulations apply to Mendelson’s property. *Ralston*, at *8. “Adjudicating [his] regulatory takings claims
 14 without a final decision from the County would require the trier of fact to impermissibly speculate what
 15 land uses the County would allow on the Property.” *Id.* at *9. Instead, this Court should dismiss this case
 16 until Mendelson seeks and receives a final decision from the County.

17 I. CONCLUSION

18 For the reasons stated in the principal and supplemental briefs, the County asks the Court to find
 19 Mendelson’s claim unripe, and to grant the County’s motion to dismiss without leave to amend.

21 Dated: November 22, 2021

Respectfully submitted,

22 JOHN C. BEIERS, COUNTY COUNSEL

24 By: /s/ Lauren F. Carroll

25 Lauren F. Carroll, Deputy
 Kimberly A. Marlow, Deputy
 Timothy J. Fox, Deputy

27 Attorneys for Defendant
 28 COUNTY OF SAN MATEO

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28